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No. _____

In the
SUPREME COURT OF THE UNITED STATES

Director of Revenue,

Petitioner,

v.

CoBank ACB, as Successor to the National Bank for Cooperatives,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri

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PETITION FOR WRIT OF CERTIORARI

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62 pp

QUESTION PRESENTED

Whether Congress, by repealing a contingent exemption from state taxation that included immunity from state income taxes for a Farm Credit System institution, and enacting in lieu thereof a noncontingent exemption that did not include state income taxes, permitted that institution to avoid the specific effects of the statute and partake instead of inherent immunity.

PARTIES TO THE PROCEEDING

All of the parties to the proceeding are listed in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Director of Revenue of the State of Missouri, currently Quentin Wilson, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Missouri.

OPINIONS BELOW

The opinion of the Supreme Court of Missouri (Appendix ("App.") A1-A-3), entered on January 25, 2000, is reported at 10 S.W.3d 142. The opinion covers two appeals,

one by three "production credit associations" (PCAs), and one by a "bank for cooperatives" (BFC), CoBank. The decision of Missouri's Administrative Hearing Commission (AHC) is not reported; it is printed at App. A4-A14.

JURISDICTION

The Supreme Court of Missouri entered its judgment on January 25, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

12 U.S.C. § 2134 (1988):

> Each bank for cooperatives and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such bank shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder.

Rev. Stat. Mo. § 143.071 (1994):

> 1. For all tax years beginning before September 1, 1993, a tax is hereby imposed upon the Missouri taxable income of corporations in an amount equal to five percent of Missouri taxable income.
>
> 2. For all tax years beginning on or after September 1, 1993, a tax is hereby imposed upon the Missouri taxable income of corporations in an amount equal to six and one-fourth percent of Missouri taxable income.

Rev. Stat. Mo. § 143.441 (1994) (in pertinent part):

> 1. The term "corporation" means every corporation, association, joint stock company and joint stock association organized, authorized or existing under the laws of this state and includes:
>
> (1) Every corporation, association, joint stock company, and joint stock association organized, authorized, or existing under the laws of this state, and every corporation, association, joint stock company, and joint stock association, licensed to do business in this state, or doing business in this state, and not organized, authorized, or existing under the laws of this state, or by any receiver in charge of the property of any such corporation, association, joint stock company or joint stock association;
>
> . . . .
>
> 2. The tax on corporations provided in subsection 1 of section 143.431 and section 143.071 shall not apply to:
>
> . . .
>
> (5) Any other corporation that is exempt from Missouri income taxation under the laws of Missouri or the laws of the United States.

INTRODUCTION AND STATEMENT

Since *McCulloch v. Maryland*, 17 U.S. 316 (4 Wheat.) (1819), this Court has, from time to time, struggled with the scope of immunity from state and local taxation for various persons or entities with ties to the government of the United States. The pace of such struggles accelerated in the latter half of the 20th century, as the scope of the government's activities grew, particularly in economic spheres.

This is one in a series of cases arising from state efforts to tax institutions that were created as part of the Farm Credit System. In this case, the object of taxation is a bank for cooperatives (BFCs). Congress first spoke of the immunity for such banks when it created them and production credit associations (PCAs) in 1933. Congress defined both BFCs and PCAs as "federal instrumentalities." And it defined the scope of their exemption from state and local taxes.

Pursuant to that statutory provision, by 1971 all of the BFCs, as well as the PCAs, paid state and local taxes. They did so pursuant to the 1933 language, which was eventually embodied in 12 U.S.C. §§ 2077 (for PCAs) and 2134 (for BFCs). In 1985, Congress enacted parallel amendments to those parallel statutes. The regulated institutions claimed below that by deleting language in the statutes that provided for a broad exemption, Congress provided such an exemption by returning the institutions from statutorily-regulated immunity to the inherent constitutional immunity of *McCulloch*.

Whether the language adopted in 1985 had that unannounced effect has been addressed in various forums. Only one U.S. Court of Appeals has considered it: the Eighth, whose sharply divided opinion was reversed on jurisdictional grounds. *Farm Credit Services of Central Ark. v. Arkansas*, 76

F.3d 961 (8th Cir. 1996), *reversed on other grounds* 520 U.S. 821 (1997). The division among the various state courts and administrative agencies that have addressed it is as stark as the division among the Eighth Circuit judges.

The immediate conflict is between Missouri and New Mexico. Both have recently considered the language now found in § 2077 and § 2134. On January 24, 2000, the Supreme Court of Missouri held that the 1985 change eliminated the states' ability to tax the pertinent Farm Credit institutions. App. A3. A week later, the New Mexico Court of Appeals held that under the same language, states can continue to tax them; the New Mexico Supreme Court denied certiorari. *Production Credit Ass'n of Eastern N.M. v. Taxation & Revenue Dept.*, No. 20078, 2000 WL 300857 (N.M. App. Feb. 1, 2000) (printed in the Appendix at A15), *cert. denied Production Credit Ass'n of Eastern N.M. v. Taxation & Revenue Dept.*, No. 26,211 (N.M. March 13, 2000).

These courts' divergent views are a function of how they interpret the standards set by this Court for Congress to meet in waiving the immunity of federal instrumentalities to state taxation. The Missouri court held that the standard requires that Congress enact language specifying just which taxes a state can impose. The New Mexico court held that when Congress expressly exempts a federal instrumentality from a limited set of taxes, Congress has waived that entity's immunity from other, unmentioned taxes.

These conflicting holdings have an obvious impact on the states and on the affected financial institutions. But the varying rationales have broader application. When creating and regulating federal instrumentalities, Congress is empowered to allocate the burdens of taxation and the benefits of revenue. But what standard must its language meet? And what statutes

must it now amend, if its intent with regard to the allocation of burdens and benefits is to be carried out? The conflicting answers given by the Missouri and New Mexico courts demand this Court's attention.

1. The administrative decision. This case began with a claim for refund of state income taxes filed by CoBank. CoBank, the only remaining BFC,[1] sought refunds of taxes paid to Missouri by one of its predecessors, National Bank for Cooperatives. CoBank and its predecessors provide credit and related services to farmers, ranchers, and producers or harvesters of aquacultural products, and to agricultural, aquaculture, and utility cooperatives. App. A7. BFCs have long been owned by borrowers. *Id.*

NBC filed Missouri corporate income tax returns and paid income tax for tax years 1991 through 1994. In March 1996, CoBank filed amended returns on behalf of NBC, seeking refunds of income tax paid for 1991 through 1994. The Missouri Director of Revenue denied those claims in pertinent part.[2]

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[1] The National Bank for Cooperatives, which operated in Missouri, was formed by the mergers of many of the existing BFCs in 1989. CoBank was formed in 1995 from a consolidation of NBC with two other entities. In 1999 the sole remaining independent BFC also merged into CoBank.

[2] In March 1995, the Missouri Secretary of State assessed franchise taxes on CoBank for 1991 through 1994. Though mentioned in the Administrative Hearing Commission decision, the imposition of those taxes was not resolved and thus was not at issue before the Missouri Supreme Court. *See* App. A13.

In March 1998, CoBank filed a complaint in Missouri's Administrative Hearing Commission (AHC), challenging that decision. The AHC upheld the Director's denial. App. A13. For jurisdictional reasons, it did not reach the PCAs' constitutional claim. *Id.* CoBank appealed to the Missouri Supreme Court.

2. The Statutes. The Director imposed taxes on CoBank pursuant to Rev. Stat. Mo. § 143.071 (1994), Missouri's corporate income tax. CoBank did not argue that it was excluded by Missouri law. It relied, instead, on federal tax immunity.

BFCs, like PCAs, were among the group of institutions created by Congress and broadly described as the "Farm Credit System" -- a system that began with the creation of "federal land banks" in 1916. Pub. L. No. 64-158, § 4, 39 Stat. 360, 362 (1916). The various financial institutions in the Farm Credit System, like national banks, are tied to the federal government both by their federal charters and by the federal government's continuing regulation. *See* H.R. REP. NO. 425, 99th Cong., 1st Sess. 5 (1985), *reprinted in* 1985 U.S.C.C.A.N. 2587, 2591.

Congress gave the original land banks a broad exemption from taxation. The exemption applied to the banks themselves, to their assets, and to their income. Pub. L. No. 64-157, § 26, 39 Stat. 380. It remains in force today, largely unchanged. 12 U.S.C. § 2098 (1988). As to real property taxes, however, Congress from the beginning distinguished the land banks from federal agencies generally: federal agency lands were not subject to state and local property taxes; land bank-owned land was. *Id.*

Over the years, the Farm Credit System grew in size and scope. For example, Congress created "intermediate credit

banks" in 1923, retaining for them the same broad statutory tax exemption possessed by land banks since 1916. Pub. L. No. 67-503, § 210, 42 Stat. 1454, 1459 (1923). Congress streamlined the system in 1987 by merging the land banks and the intermediate credit banks. The statutory 1916 tax exemptions, with only slightly changed wording, still applied to the merged entities. *See* 12 U.S.C. § 2023.

The forms of financial institutions that were before the Missouri Supreme Court, PCAs and BFCs, were authorized by the Farm Credit Act of 1933. *See* Pub. L. No. 73-98, § 20, 48 Stat. 257, 259-60 (1933). PCAs and BFCs were initially capitalized and owned entirely by the federal government. Over the years, however, borrowers achieved what Congress had intended (S.REP. NO. 124, 73d Cong., 1st Sess. 2 (1933)): the government's stock was retired and ownership was vested entirely in private hands. *See* A7.

For the banks authorized in 1933, Congress departed from the broad immunity that it promised to the land banks. Instead, it set up a scheme under which the institutions would have such broad immunity only temporarily. So, while the United States remained a shareholder, these new institutions would pay property taxes, but be exempt from others:

> The Central Bank for Cooperatives, the Production Credit Corporations, Production Credit Associations, and Banks for Cooperatives, organized under this Act, and their obligations, shall be deemed to be instrumentalities of the United States, and as such, any and all notes, debentures, bonds, and other such obligations issued by such associations shall be exempt both as to principal and interest from all taxation ... imposed by the

> United States or by any State, Territorial, or local taxing authority. Such associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income, shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property ... shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. The exemption provided herein shall not apply with respect to . . . any . . . Bank for Cooperatives, or its property or income after the stock held in it by the [United States] has been retired.

Pub. L. No. 73-98, § 63, 48 Stat. at 267 (emphasis added). Thus the law declared that BFCs and their financial instruments are "federal instrumentalities." And it them gave a list of exemptions from tax: first for financial instruments; then for property, franchises, capital, reserves, surplus, other funds, and income. But it qualified that second, broad exemption in two ways. First, it excluded from the exemption property taxes, thus permitting states and local governments to continue receiving such taxes though the property may be foreclosed or otherwise acquired by the BFC. Second, it made the remaining exemption contingent on the United States still owning shares in the institution.

The federal government, then, temporarily lent its credit and resources to make each BFC viable. During the period of that loan, Congress made states and local governments share the burden by precluding them from imposing taxes on that BFC, other than property taxes. But state and local governments had paid their share once the government's stock was retired. Thus

long before this case was brought, the BFCs, like the PCAs, retired their federal shares, lost the contingent exemption, and paid state and local taxes (except for taxes on their financial instruments). *See Farm Credit Services of Central Ark. v. Arkansas*, 76 F.3d 961 at 966 (Loken, J. dissenting), and cases cited therein; *Zeiss v. Benham Production Credit Ass'n*, 259 S.W.2d 299, 301-02 (Tex. Civ. App. Waco 1953); *Farmers' Production Credit Ass'n of South Burlington v. Vermont*, 481 A.2d 18 (Vt. 1984).

Just as the savings and loan crisis prompted reform of the federal deposit insurance program, a crisis in American agriculture persuaded Congress to restructure the farm credit system in 1985. *See generally Colorado Springs PCA v. Farm Credit Admin.*, 967 F.2d 648, 650-52 (D.C. Cir.1992). That restructuring eliminated the position of "Governor" of the Farm Credit System. Because the title "Governor" was used in the last sentence of the now separate, but still identical PCA and BFC tax exemption statutes (the "sunset" clause), the restructuring required amendment. Thus Congress eliminated the "sunset" clause and the language creating the broad, contingent exemption -- on which, by that time, the sun had set because the government's stock had been retired. *See* Pub. L. No. 99-205, § 205(e)(16), 99 Stat. 1678, 1705 (1985).

What remained, with minor subsequent changes, were the tax exemptions now codified at 12 U.S.C. §§ 2077 and 2134. There Congress, having deleted the broad exemptions in the original statutes, preserved the tax-exempt status only of investment vehicles issued by PCAs and BFCs:

> Each [institution] and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territory, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder.

12 U.S.C. §§ 2077 and 2134.

3. Decision of the Missouri Supreme Court. The Missouri Supreme Court went directly to the question that the AHC lacked jurisdiction to decide: whether the PCAs and CoBank, as federal instrumentalities, are immune from state and local taxation. Or stated in the converse, did Congress, in enacting the limited exemptions now found in §§ 2077 and 2134, waive the PCAs' and BFCs' immunity to other state and local taxes? The court held that it did not. App. A3.

REASONS FOR GRANTING THE WRIT

I. The Missouri and New Mexico decisions conflict, holding that precisely the same federal statutory language grants tax immunity in one state but not in the other.

Before the Missouri court were claims of immunity from Missouri's corporate income tax brought by two types of institutions within the Farm Credit System. The first type was "production credit associations" (PCAs), which pointed to 12 U.S.C. § 2077 to dictate their liability for or exemption from state and local taxes.[3] The second type was the "bank for

[3] Because of an agreement reached with the Missouri production credit associations in another case, the Director of

cooperatives" (BFCs), which pointed to identical language in 12 U.S.C. § 2134. The Missouri Supreme Court held that BFCs and PCAs are federal instrumentalities, and that the language found in §§ 2077 and 2134 does not constitute a waiver that permits state and local taxation.

Before the New Mexico Court of Appeals was a claim of immunity from New Mexico's corporate income and franchise taxes, brought by a PCA and thus invoking from § 2077 the identical language applied by the Missouri court from both § 2077 and § 2134. The New Mexico Court of Appeals held that PCAs, despite being federal instrumentalities, are subject to state and local taxation because that language constitutes a valid waiver of their immunity.[4]

There is no way to reconcile these holdings.

The result? A PCA operating in New Mexico looks to §2077, but must still pay state and local taxes. A BFC operating in Missouri looks to the same language in § 2134 and finds immunity. Those differences, which arise purely from interpretation of federal and not state law, merit this Court's attention.

This is not the first time the question of the impact of this statutory language has been presented to this Court for review. It has twice come in a case from Arkansas. Most

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Revenue is not seeking certiorari as to the refund claims made by those entities.

[4] The New York Division of Tax Appeals has recently reached that same conclusion. *In re Farm Credit of Western New York*, January 13, 2000 (copy available at http://www.nysdta.org/816576.det.htm).

recently, this Court denied a petition for writ of certiorari in *Arkansas v. Farm Credit Services of Central Arkansas*, No. 99-993, *cert. denied* No. 99-993, 2000 WL 305848 (Mar. 27, 2000), though only after questioning whether the Arkansas Department of Revenue had authority to file the petition (*see Barclay v. Farm Credit Services*, 8 S.W. 3d 517 (Ark. 2000)). But this Court had granted certiorari in a prior version of essentially the same case, on the same question. *Farm Credit Services of Central Ark. v. Arkansas*, 520 U.S. 821 (1997).[5] The Court did so after hearing from the Solicitor General, who supported the petition and who later supported Arkansas' position on the issue presented here. The Court also, however, followed the urging of the Solicitor General and decided the case on jurisdictional grounds under the Tax Injunction Act. *See id.* and Brief of the United States (on petition for writ of certiorari and on the merits), No. 95-1918 at 7; Brief of the United States (on the merits), No. 95-1918 at 23, 1997 WL 86301.

Unlike the Arkansas case, this case involves problems with neither authority to petition nor lower court jurisdiction. Though the New Mexico decision was apparently identified to the Court during consideration of the second Arkansas petition through post-petition letters, its effect was not briefed. The direct conflict between that decision and the decision of the Supreme Court of Missouri firmly establishes the importance of the issue.

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[5] In that case, the only one in which a federal appellate court has addressed the precise question at issue here, the court split. *See Farm Credit Services of Central Ark. v. Arkansas*, 76 F.3d 961 at 966 (Loken, J. dissenting). This Court's decision in that case merely ensured that future litigation will take place in the states.

II. The Missouri and New Mexico courts arrive at their opposing conclusions by adopting conflicting readings of this Court's requirements for congressional waivers of tax immunity for federal instrumentalities.

This case presents a fundamental question of federal law. It arises from doctrines going back to *McCulloch*. The question is not, however, one of whether a federal instrumentality is normally exempt from state and local tax. Nor is it whether the Farm Credit System's financial institutions are "federal instrumentalities," normally entitled to tax immunity. The question addresses only the manner in which Congress can waive that immunity.

As the New Mexico court observed, the Missouri Supreme Court and others that ruled with it, "without exception, based their decisions on the well-settled rule that federal instrumentalities retain their inherent immunity from state taxation in the face of Congressional silence." 2000 WL 300857 *8, *citing Arkansas v. Farm Credit Servs.*, 994 S.W. 2d 453; and *Farm Credit Servs. of Mid-America*, 705 N.E.2d 1092 (Ind. Tax Ct. 1999). The New Mexico court recognized that the specific *language* in the current version of the pertinent waiver provision is silent as to immunity, except for taxes on financial instruments. But that did not mean, in that court's view, that *Congress* was silent.

The New Mexico court found that Congress had spoken by word and action. It began by reviewing the changes enacted in the statute over the years. It also considered the written legislative history. It concluded that Congress's intent in 1985 was clear: to eliminate the tax exemption that had fallen into disuse, and to continue only a very limited exemption for the institutions' instruments and obligations. The court observed

that the contrary view requires a conclusion that Congress made a dramatic change in the Farm Credit institutions' tax liability without announcement, through an amendment that Congress described as "'technical and conforming.'" 2000 WL 300857 at *7 (A27), *quoting* H.R. REP. NO. 425 at 28-29, 1985 U.S.C.C.A.N. at 2615. According to the New Mexico court, that history defeats the premise that Congress was "silent."

Contrary to the conclusion of the Missouri coûrt, this case is not about Congressional silence. It is about the meaning of what Congress said -- or about how Congress must say what immunity it permits for a privately-owned entity that it creates. The New Mexico and Missouri courts answered that question differently because they traveled on different paths. Like the PCAs, CoBank operates in all 50 states. Thus all the states will have to chose between the paths that Missouri and New Mexico traveled. As they make different choices, they will necessarily reach different results. Owners of financial institutions and state taxpayers will benefit or suffer, depending on those results. This court should mark the correct path and eliminate that inconsistency.

III. Resolving the conflict is important to the nation's banking system and to Congress, which allocates burdens and benefits between the states and the federal government and among the various classes of financial institutions.

"Federal instrumentalities" come in a wide variety of forms, from the Red Cross (*see Department of Employment v. United States*, 385 U.S. 355 (1966)), to the U.S. Army Post Exchanges (*see Standard Oil Co. of Calif. v. Johnson*, 316 U.S. 481, 483-85 (1942)). For some types of federal instrumentalities, Congress has chosen to never give or to

completely repeal waiver statutes, leaving them to be taxed only within constitutionally-established limits. *See United States v. Boyd*, 378 U.S. 39, 51 & n. 10 (1964). For others, Congress has chosen to allocate by statute the burdens and benefits among federal, state, and local governments by defining the extent to which those entities will be subject to or exempt from state and local taxation.

Congress has consistently taken the latter course with regard to federally-chartered financial institutions. The nature of local tax liability for such institutions varies from near-complete immunity[6] to nothing more than the states themselves give.[7] Congress has included some common elements in those statutes. The most consistent example is a specific provision permitting state and local property taxes, like the one found in the former, contingent exemption for PCAs and BFCS. Such permission is found in the statutes that regulate other institutions in the Farm Credit system,[8] as well as in statutes regulating the wide range of other federally-chartered financial institutions.[9] By contrast, in other instances Congress

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[6] *See* 7 U.S.C. § 1511 (Fed. Crop Ins. Corp.)

[7] *See* 12 U.S.C. § 548 (national banks). *See also Liberty Nat'l Bank & Trust Co. v. Buscaglia*, 235 N.E. 2d 101 (N.Y. Ct. App. 1967).

[8] *See, e.g.*, 12 U.S.C. § 2023 (farm credit banks); 12 U.S.C. § 2098 (land banks); 12 U.S.C. § 2278a-11 (Assistance Board); 12 U.S.C. § 2277a-12 (Farm Credit System Insurance Corp.); 12 U.S.C. § 2278b-10 (Financial Assistance Corp.).

[9] *E.g.*, 12 U.S.C. § 531 (federal reserve banks); 12 U.S.C. § 1433 (federal home loan banks); 12 U.S.C. § 1441a(g) (Resolution Trust Corp.); 12 U.S.C. § 1452(e) (Federal Home Loan Mortgage Corp.); 12 U.S.C. § 1464(b) (federal savings associations); 12 U.S.C. § 1723a (Government Nat'l Mortgage Ass'n and Federal National Mortgage Ass'n); 12 U.S.C. § 1749bb-20 (National Insurance Development Fund); 12 U.S.C. § 1768 (federal credit unions); 12 U.S.C. § 1795k (Central Liquidity Facility); 12 U.S.C. § 1825 (Federal Deposit Ins. Corp.); 12 U.S.C. § 2290 (Federal Financing Bank); 12 U.S.C. § 3019 (Nat'l Consumer Cooperative Bank); 15 U.S.C. § 713a-5 (Commodity Credit Corporation); 15 U.S.C. § 78kk(e) (Securities Investor Protection Corp.); 20 U.S.C. § 1087-2(b)(2) (Student Loan Marketing Ass'n); 42 U.S.C. § 8102(d) (Neighborhood Reinvestment Corp.).

has expressly exempted federal instrumentalities from property taxes.[10] The careful determination of when federal institutions that acquire property must pay taxes that would be due from private owners is just one example of the ways in which Congress has assigned the burdens of state taxation to individual categories of federal instrumentalities.

The decision of the Missouri Supreme Court threatens that allocation. Relying on Congressional "silence," it exempts entirely from state and local taxation just two among the myriad types of financial institutions. In essence, it declares that Congress, by its failure to include exact language in a "technical and conforming" amendment, shifted PCAs and BFCs all the way from the "pay all state and local taxes," past the "pay property taxes," to the "pay no taxes" category. It thus deprives

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[10] *See, e.g.*, 16 U.S.C. § 191 (National Park Foundation); 16 U.S.C. § 583j-2(e)(2) (National Forest Foundation); 31 U.S.C. 2124c(j) (Rural Tourism Development Foundation). *See also* 49 U.S.C. § 24301(1)(k) (partial and conditional exemption for Amtrak). Congress' concern for preserving the ability of states to obtain revenue is so great that in some instances where the federal instrumentality remains exempt from property tax, Congress has authorized payments in lieu of taxes. *E.g.*, 7 U.S.C. § 941(c) (Rural Telephone Bank); 16 U.S.C. § 8311 (Tenn. Valley Auth.).

state and local governments of needed revenue. And it suddenly alters the balance between competing financial institutions.[11]

Perhaps the Missouri Supreme Court is right, and the rule is that Congress expands the tax exemption enjoyed by a species of federal instrumentality merely by replacing a broad exemption with a narrower one. But if so, financial institutions and other federal instrumentalities, the states, and Congress need to know. This Court's decision in *Farm Credit Services of Central Ark. v. Arkansas* ensures that the answer will not come from the lower federal courts. The conflict evident here shows that the fifty states will not give consistent answers.

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[11] For a recent discussion of the relative positions of Farm Credit System and other financial institutions, *see* Panos Konstas, "Government-Sponsored Enterprises: Their Role as Conduits of Credit and as Competitors of Banking Institutions," FDIC Banking Review, Vol. 8 No. 2 (June 1995), available at http://www.fdic.gov/bank/analytical/banking/ 1995sprg/ rbr01a02. html.

CONCLUSION

For the reasons stated above, the Court should grant the petition and resolve the conflict as to whether Congress, merely by replacing a broad tax exemption with a narrow one, expands the scope of a federal instrumentality's tax immunity.

Respectfully submitted,

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APPENDIX

APPENDIX INDEX

Decision of the Missouri Supreme Court A-1

Decision of the Administrative Hearing Commission ... A-5

Decision of the New Mexico Court of Appeals A-17

Opinion
Supreme Court of Missouri

Production Credit Association of Southeastern Missouri, et al., Appellants, v. Director of Revenue, Respondent. CoBank, ACB, as Successor to The National Bank for Cooperatives, Appellant, v. Director of Revenue, State of Missouri, Respondent.

SC81407 and SC81727
01/25/2000

Stephen N. Limbaugh, Jr., Judge

This is a consolidated case in which several member institutions of the Farm Credit System seek review of the decisions of the Administrative Hearing Commission (AHC) upholding the Director of Revenue's (Director) assessment of corporate income tax. Appellants claim that their status as federal instrumentalities exempts them from corporate income tax unless Congress expressly consents to the tax, and that Congress has not given that consent. Because appellants challenge the constitutional validity of section 143.071, RSMo 1994, the statute imposing the tax, this Court has exclusive jurisdiction. Mo. Const. art. V, sec. 3. The decisions of the AHC are reversed, and the cases are remanded.

Appellants in both cases -- Production Credit Association of Southeast Missouri, Farm Credit Services of Western Missouri, Farm Credit Services of Eastern Missouri, and CoBank, ACB (successor in interest to National Bank for Cooperatives) -- are part of the Farm Credit System created by Congress and chartered by the Farm Credit Administration in accordance with the Farm Credit Act of 1971. 12 U.S.C. sec. 2001, *et seq*. The appellants are farmer owned, agricultural, cooperative

organizations whose only business is to assist farmers in obtaining adequate and reliable credit at the lowest possible cost. They have been designated as "federally chartered instrumentalities of the United States." 12 U.S.C. sections 2071, 2141.

Appellants filed Missouri corporate income tax returns for the years 1991 through 1994 and paid the taxes shown on those returns. Thereafter, they filed amended returns requesting an exemption from all state taxes and refunds of the taxes erroneously paid. The Director then issued a "final decision" refusing the requests. On appeal, the AHC denied relief because it had no jurisdiction to address constitutional claims, *State Tax Comm'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69, 75-76 (Mo. banc 1982), and, in particular, the validity of the corporate income tax as applied to the appellants. On appeal to this Court, the two cases have been consolidated.

According to the rationale first expressed in *McCulloch v. Maryland*, 17 U.S. 316, 436-37 (4 Wheat.) (1819), the Supremacy Clause of the United States Constitution accords federal instrumentalities immunity from state taxation. *United States v. State Tax Comm'n of Miss.*, 421 U.S. 599, 605 (1975); *First Agric. Nat'l Bank of Berkshire v. State Tax Comm'n*, 392 U.S. 339, 340 (1968); *Department of Employment v. United States*, 385 U.S. 355, 358 (1966); *United States v. Allegheny County*, 322 U.S. 174, 177 (1944). The Supreme Court has explained, however, that Congress can waive this immunity, but only if it expressly consents to state taxation. *Allegheny County*, 322 U.S. at 177. *See also Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 122 (1954) ("this Court cannot subject the Government or its official agencies to state taxation without a clear congressional mandate."). The Director does not dispute that appellants are federal instrumentalities or that Congress must give express authorization to state taxation. Instead, he

argues that Congress' consent is clear when the current version of the Farm Credit Act, which is silent on the issue, is compared with the previous version, Farm Credit Act of 1971, Pub. L. No. 92-181, sections 2.17, 3.13, 85 stat. 583, 602, 608 (1971), which, until amended in 1985, expressly exempted member institutions from state income tax. As the Director explains, by deleting the exemption from state income tax, Congress necessarily intended to consent to the imposition of state income tax.

The Director's argument is unpersuasive. Congressional consent, under the Director's theory, is not express, but is merely implied, and the absence of express consent is sufficient under the Supreme Court precedents to rebut the Director's claim. Furthermore, because the current version of the statute is silent on the matter, Congress' position is unclear, at best. Under these circumstances, Congress cannot be said to have expressly consented to state income tax.

Accordingly, this Court holds, as have the other courts that have addressed the issue of state taxation of member institutions of the Farm Credit System, that appellants are exempt from state income taxation. *See Farm Credit Serv. of Cent. Ark. v. Arkansas*, 76 F.3d 961, 964 (8th Cir. 1996), *rev'd on other grounds*, 520 U.S. 821 (1997); *State v. Farm Credit Serv. of Cent. Ark.*, 994 S.W.2d 453, 456 (Ark. 1999), *petition for cert. filed*, 68 U.S.L.W. 3401 (Sept. 28, 1999) (No. 99-993); *Farm Credit Serv. of Mid-America v. Department of State Revenue*, 705 N.E.2d 1089, 1092 (Ind. Tax Ct. 1999); *Northwest La. Prod. Credit Ass'n v. State*, 98 CA 1995, 1999 WL 1000995 (La. Ct. App. Nov. 5, 1999).

Having determined that the appellants are exempt from state income taxes, they are entitled to refunds on the taxes paid. The decisions of the AHC upholding the imposition of state income

taxes are reversed, and the cases are remanded.

All concur.

Before the
Administrative Hearing Commission
State of Missouri

COBANK, ACB, AS SUCCESSOR TO THE NATIONAL BANK FOR COOPERATIVES,	)	
Petitioner,	)	
vs.	)	Nos. 98-0716 & 98-0718 RI
DIRECTOR OF REVENUE,	)	
Respondent.	)	

COBANK, ACB, AS SUCCESSOR TO THE NATIONAL BANK FOR COOPERATIVES,	)	
Petitioner,	)	
vs.	)	No. 95-2048 SS
SECRETARY OF STATE OF THE STATE OF MISSOURI,	)	
Respondent.	)	

MEMORANDUM AND ORDER

On March 13, 1998, Cobank, ACB, as successor to the National Bank for Cooperatives (NBC), filed a complaint challenging the Director of Revenue's February 20, 1998, final decision denying NBC's claim for a refund of Missouri corporate income taxes for 1991 through 1993. We assigned case No. 98-0718 RI to that case. On March 13, 1998, Cobank also filed a complaint challenging the Director of Revenue's February 20, 1998, final decision denying in part NBC's claim for a refund of Missouri corporate income tax for 1994. We assigned case No. 98-0716 RI to that case.

On August 23, 1995, Cobank, as successor to NBC, filed a complaint challenging the Missouri Secretary of State's July 26, 1995, decision denying NBC's protest of the Secretary's franchise tax assessment against NBC for 1991 through 1994. We assigned case No. 95-2048 SS to that case. Cobank raised three issues: (1) whether NBC was immune from state taxation; (2) whether NBC was subject to franchise tax under Chapter 147, RSMo; and (3) whether a retroactive change in policy by the Secretary was unconstitutional. On August 7, 1996, we issued an order granting Cobank's motion to hold that case in abeyance pending the United States Supreme Court's ruling on the State of Arkansas' petition for writ of certiorari in ***Farm Credit Servs. of Central Arkansas, PCA v. State of Arkansas***, 76 F.3d 961 (8th Cir. 1996).

In all three cases, Cobank claims that NBC was a federal instrumentality and therefore was not subject to taxation by the State of Missouri.

On September 23, 1998, we held a pre-hearing conference in Case Nos. 98-0716 RI and 98-0718 RI. At the conference, Cobank and the Director agreed to a schedule for

Cobank to file a motion for summary determination and for the Director to file a response.

On October 7, 1998, we ordered the parties in case No. 95-2048 SS to show cause why the case should not be taken out of abeyance and set for hearing. On November 5, 1998, the Secretary filed a response, requesting that case No. 95-2048 SS be consolidated with the income tax cases for purposes of determining whether Cobank is immune from state taxation, and requesting that the Secretary be included in the schedule allowing a response to the motion for summary determination that Cobank would file.

On November 19, 1998, Cobank filed its motion for summary determination in Case Nos. 98-0716 RI and 98-0718 RI, arguing that it is exempt from taxation by the State of Missouri.

On November 19, 1998, we issued an order consolidating the two income tax cases, removing case No. 95-2048 SS from abeyance status, consolidating the franchise tax with the income tax cases only for purposes of determining whether NBC was immune from taxation by the State of Missouri, and revising the briefing schedule on Cobank's motion for summary determination. Therefore, the three cases are consolidated for purposes of ruling on Cobank's motion for summary determination.

The Director filed a response to Cobank's motion for summary determination on January 19, 1999. The Secretary filed a response to the motion on February 18, 1999, and moved for summary determination on the question of whether NBC was immune from taxation by the State of Missouri. Cobank filed a reply brief on March 11, 1999.

Juan D. Keller, John P. Barrie, and B. Derek Rose, with Bryan Cave LLP, represent Cobank. Joyce Hainen, Legal Counsel, and Wood Miller, Senior Counsel, represent the Director. Assistant General Counsel Jill R. Jackson represents the Secretary.

On April 15, 1999, we issued an order withholding ruling on Cobank's motion for summary determination at that time because material issues of fact were not resolved. On May 4, 1999, the Director filed an affidavit and business records. On May 28, 1999, we issued an order to show cause by June 4, 1999, why we should not issue a ruling on Cobank's motion for summary determination. Because no party has shown cause why we should not rule on the motion, we issue this ruling on Cobank's motion for summary determination.

Under our Regulation 1 CSR 15-3.450(4)(C), we must grant a motion for summary determination "if the pleadings and evidence on file show that there is no genuine issue as to any material fact and that any party is entitled to relief as a matter of law[.]"

Findings of Fact

1. NBC was part of the Farm Credit System, a network of borrower-owned financial institutions and related service organizations specializing in providing credit and related services to farmers, ranchers, and producers or harvesters of aquatic products. NBC made loans to agricultural, aquatic, and public utility cooperatives.

2. NBC was a federally chartered instrumentality resulting from the merger of various banks for cooperatives.[1]

[1]The Director objects to Cobank's Exhibit A, a copy of NBC's charter, on grounds that the certification is not notarized and does not have the address of the signor. The exhibit is authenticated as required by section 490.220, RSMo 1994. 12 U.S.C. section 2141(a) likewise provides that NBC is a federally chartered instrumentality.

Its charter from the Farm Credit Administration became effective on January 1, 1989.

3. NBC was completely borrower-owned during the years at issue. The federal government held no stock in NBC.

4. Cobank is the successor to NBC. Cobank was established pursuant to the consolidation of NBC, the Springfield Bank for Cooperatives, and the Farm Credit Bank of Springfield. Cobank's charter from the Farm Credit Administration became effective on January 1, 1995.

5. Cobank filed amended Missouri income tax returns and applications for refund on behalf of NBC, requesting a refund of all Missouri income tax paid for 1991, 1992, and 1993 in the following amounts:

1991	$158,001
1992	$223,354
1993	$108,583

The Director denied the refund claims. Cobank protested, and the Director issued a final decision dated February 20, 1998, denying the protest.

6. Cobank filed an application for refund of $179,533 in Missouri income tax on behalf of NBC for 1994. The Director approved a refund of $32,703 and denied the remainder of the refund claim. Cobank protested, and the Director issued a final decision dated February 20, 1998, denying the protest.

7. On March 30, 1995, the Secretary issued a notice of

franchise tax assessment to Cobank as follows, with interest computed through April 30, 1995:

Year	Tax	Penalty	Interest
1991	$295,705.01	$73,926.25	$143,062.08
	Total for 1991:	$512,693.34	
1992	$280,662.98	$70,165.74	$102,183.77
	Total for 1992:	$453,012.49	
1993	$177,825.75	$44,456.43	$43,453.50
	Total for 1993:	$265,735.68	
1994	$226,019.09	$56,504.77	$28,171.01
	Total for 1994:	$310,694.87	
Grand Total		$1,542,136.38	

8. Cobank protested the assessment. On July 26, 1995, the Secretary issued a final determination denying Cobank's protest.

Conclusions of Law

This Commission has jurisdiction over appeals from the Director's final decisions. Section 621.050.1.[2] Cobank has the burden of proof. Section 621.050.2.

Section 143.071 imposes the Missouri income tax on corporations. The term "corporation" includes every corporation, association, joint stock company and joint stock association doing business in this state. Section 143.441.1(1). Cobank makes no argument that it is excluded from taxation

[2]Statutory references, unless otherwise noted, are to the 1994 Revised Statutes of Missouri.

because it is not a corporation.

Because NBC was the taxpayer during the years at issue, we examine the statutes pertaining to NBC. Cobank argues that NBC was exempt from taxation by the State of Missouri. Relying on constitutional principles first stated in ***McCulloch v. Maryland***, 17 U.S. 316 (1819), Cobank argues that it is a federally chartered institution and is thus immune from state taxation. Although this Commission does not have jurisdiction to address constitutional questions, ***State Tax Comm'n v. Administrative Hearing Comm'n***, 641 S.W.2d 69, 75-76 (Mo. banc 1982), we have a duty to make findings of fact and conclusions of law on petitions filed before us. Section 536.090; ***Farm Bur. Town & Country Ins. Co. v. Angoff***, 909 S.W.2d 348, 355 (Mo. banc 1995). We must apply the statutes, including section 143.011, as written. ***Bridge Data Co. v. Director of Revenue***, 794 S.W.2d 204, 207 (Mo. banc 1990). However, we may determine whether the statutes specifically exempted NBC from taxation.

The farmer-owned cooperative Farm Credit System was established to encourage farmer and rancher borrowers' participation in the management, control, and ownership of a system of credit for agriculture that is responsive to the credit needs of agricultural producers. 12 U.S.C. section 2001. NBC was formed by a merger of various banks for cooperatives. 12 U.S.C. section 2121 provides:

> The banks for cooperatives established pursuant to sections 2 and 30 of the Farm Credit Act of 1933, as amended, shall continue as federally chartered instrumentalities of the United States.

12 U.S.C. section 2134, regarding taxation, provides that:

> [e]ach bank for cooperatives and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such bank shall be exempt, both as to principal and interest from all taxation . . . now

or hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder.

This version of the statute has been in effect since 1988, and was thus in effect at the time of the formation of NBC. Prior to 1985 amendments, the law expressly exempted banks for cooperatives from taxation **if stock in the bank was held by the governor of the Farm Credit Administration.**[3]

Pub. L. No. 100-233, section 413, 101 Stat. 1640 (1988), as amended by Pub. L. No. 100-399, title IV, Sec. 405, 102 Stat. 1000 (1988) (*see* note to 12 U.S.C. section 2121), provided for a voluntary merger of banks for cooperatives. Paragraph (b)(4)(A) provided:

> If the stockholders of eight or more of the district banks for cooperatives approve the

[3]The prior version provided: "Such banks, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, territorial, or local taxing authority. . . . The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the bank for cooperatives is held by the Governor of the Farm Credit Administration." Farm Credit Act of 1971, Pub. L. No. 92-181, 85 Stat. 609 (1971). Congress deleted this language in the 1985 amendment. Pub. L. No. 99-105, Title II, section 205(e)(16), 99 Stat. 1705 (1985).

> merger, such banks, and the Central Bank for Cooperatives, shall be merged into a single bank, which shall be referred to as the "National Bank for Cooperatives."

NBC is thus a result of the voluntary merger of district banks for cooperatives.

12 U.S.C. section 2141(a) provides:

> (a) Charter. The National Bank for Cooperatives or the United Bank for Cooperatives, as the case may be (hereinafter in this part referred to as the "consolidated bank"), established under section 413 of the Agricultural Credit Act of 1987, shall be a federally chartered instrumentality of the United States and an institution of the Farm Credit System.
>
> (b) Powers. The consolidated bank and the board of directors of such bank shall have all of the powers, rights, responsibilities, and obligations of the district banks for cooperatives and the Central Bank for Cooperatives and the boards of directors of such banks, except as otherwise provided for in this chapter.
>
> (c) Operation. The consolidated bank shall be organized and operated on a cooperative basis.

Thus, 12 U.S.C. section 2141, which specifically pertains to NBC, does not address taxation at all; nor do we find any other provision allowing an exemption for NBC.

Congress has expressly provided for complete immunity from taxation for some members of the Farm Credit System, such as Farm Credit Banks, 12 U.S.C. section 2023, and Federal land bank associations, 12 U.S.C. section 2098. If Congress had intended to confer upon NBC the more comprehensive exemption from taxation that it provided to Farm Credit Banks and Federal land bank associations, it presumably would have done so expressly, as it had elsewhere in the Farm Credit Act. ***See Russello v. United States***, 104 S. Ct. 296, 300 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting ***United States v. Wong Kim Bo***, 472 F.2d 720, 722 (5th Cir. 1972)). Instead, Congress gradually chipped away at the tax exemption formerly provided to the banks for cooperatives. The statutes do not exempt NBC from taxation by the State of Missouri.

Further, no part of the United States Government had any stock ownership in NBC during the years at issue. Even under the prior version of the law applicable to banks for cooperatives, 21 U.S.C. section 2134, the exemption did not apply if all stock held by the governor of the Farm Credit Administration had been retired.

In Rev. Rul. 84-109, the IRS addressed production credit associations (PCAs), which are also members of the farm credit system and are thus analogous to banks for cooperatives. The IRS stated:

> PCAs originally served a governmental function, by making loans available regardless of profit potential. In order to facilitate this

> function the PCAs were made instrumentalities of the United States and were given an exemption from both federal and local taxation. However, some PCAs, such as the one in this case, are now totally controlled by private owners, perform no substantial governmental functions and operate as profit seeking financial institutions in competition with private banks and savings and loans. These PCAs are financially autonomous and are not funded by the federal government. They are not subject to substantial government control. There is no tax exemption for the PCA described in the instant situation. . . .Thus, the description of these PCAs as federal instrumentalities does not reflect their true economic function[.]

The United States Supreme Court stated in ***Arkansas v. Farm Credit Servs. of Central Arkansas***, 117 S. Ct. 1776, 1782 (1997):

> The PCAs' business is making commercial loans, and all their stock is owned by private entities. Their interests are not coterminous with those of the Government any more than most commercial interests.

Similarly, as no part of the United States Government had any stock ownership in NBC during the years at issue, NBC was not under the control of the United States Government. NBC has not established that it is a federal instrumentality that is statutorily exempt from taxation by the State of Missouri.

Summary

We do not have jurisdiction to address constitutional questions. Cobank has failed to prove that any statute exempts or exempted NBC from taxation by the State of Missouri. Therefore, we deny Cobank's income tax refund claims on behalf of NBC for 1991 through 1994. We deny Cobank's motion for summary determination as to Case Nos. 98-0716 RI and 98-0718 RI, and we grant summary determination in favor of the Director. Regulation 1 CSR 15-3.450(4)(C).

We have resolved only one issue presented in the franchise tax case. Therefore, we deny summary determination to Cobank in Case No. 95-2048 SS, but we do not grant summary determination in favor of the Secretary. We will set case No. 95-2048 SS for hearing by separate notice if necessary.

SO ORDERED on June 18, 1999.

WILLARD C. REINE
Commissioner

PRODUCTION CREDIT ASSOCIATION OF EASTERN NEW MEXICO, Appellant,
v.
TAXATION AND REVENUE DEPARTMENT of the STATE of New Mexico, Appellee.

No. 20078.

Court of Appeals of New Mexico.

Feb. 1, 2000.

Appeal from the New Mexico Taxation and Revenue Department; Gerald B. Richardson, Hearing Officer.

Curtis W. Schwartz, Timothy R. Van Valen, Modrall, Sperling, Roehl, Harris & Sisk, P.A., Santa Fe, for Appellant.

Patricia A. Madrid, Attorney General, David C. Iglesias, Chief Counsel, Monica M. Ontiveros, Special Assistant Attorney General, Taxation and Revenue Department, Santa Fe, Frank D. Katz, Special Assistant Attorney General, Santa Fe, NM, for Appellee.

OPINION

PICKARD, Chief J.

10E Production Credit Association of Eastern New Mexico (PCA) filed a claim for refund of New Mexico corporate income and franchise taxes for the 1992-1996 tax years with the New Mexico Taxation and Revenue Department (Department). PCA claimed it was entitled to a refund because (1) Congress declared production credit associations like PCA to be federal instrumentalities, (2) federal instrumentalities are inherently

immune from state taxation under the Supremacy Clause of the United States Constitution unless Congress expressly waives their immunity, and (3) Congress did not expressly waive PCA's immunity for the tax years at issue. The Department's internal hearing officer denied PCA's claim on the grounds that (1) Congress expressly waived the tax immunity enjoyed by privately owned production credit associations in the Farm Credit Act of 1933 and (2) Congress did not intend to confer upon these associations an implied immunity from state taxation by passing the Farm Credit Amendments Act of 1985, which repealed the express tax immunity waiver that had been in place since Congress passed the Farm Credit Act of 1933. We agree with the hearing officer and affirm his decision for the reasons stated below.

BACKGROUND AND PROCEDURAL HISTORY

20E In 1916, Congress passed the Federal Farm Loan Act (1916 Act). See Pub.L. No. 64-158, §§ 4, 12, 39 Stat. 360, 362-64, 370-72 (1916). The 1916 Act established the Farm Credit System (System). See id. The System was created for the purpose of providing secured credit to farmers and ranchers at reasonable cost. See S .Rep. No. 144, at 2-3 (1916). The System, which then consisted of twelve regional land banks, could make loans only to farmers and ranchers. See Pub.L. No. 64-158, §§ 4, 12, 39 Stat. at 362-64, 370-72. The loans had to be secured by first mortgages on farm or ranch property. See id. Seven years later, Congress created federal intermediate credit banks for the purpose of making farm and ranch loans that could be secured by something other than first mortgages on farm or ranch lands. See Pub.L. No. 67- 503, § 202(a)(3), 42 Stat. 1454, 1455 (1923).

30E In 1933, Congress, in response to the Great Depression, passed the Farm Credit Act of 1933 (1933 Act). See Pub.L. No.

73-75, § 20, 48 Stat. 257, 259. The 1933 Act established production credit associations (credit associations) like PCA for the purpose of providing short- and intermediate-term loans to farmers and ranchers. See S.Rep. No. 124, at 2 (1933). The United States initially capitalized and owned all the stock in the credit associations. See id. Pursuant to statute, the credit associations were exempt from state taxation while the federal government owned stock in them. See Pub.L. No. 73- 75, § 63, 48 Stat. at 267. However, pursuant to the same statute, once the federal government's stock was retired, the 1933 Act expressly waived the credit associations' immunity from state income and franchise taxes. See id. Congress hoped that the United States' ownership interest in the credit associations would come to an end at some point and that the credit associations would eventually become locally owned by their borrowers. See S.Rep. No. 124, at 2.

40E In order to fulfill its hope, Congress required farmers and ranchers to purchase stock in the credit association from which they were borrowing in an amount equal to 10% of the unpaid principal balance of their respective loans. As part of the loans, sufficient proceeds were generally advanced to the borrowers to purchase the required stock. Congress's hope was realized in the 1960s, by which time the credit associations were owned entirely by the farmers and ranchers who had borrowed money from them. The federal government no longer had an ownership interest in any credit association, nor has it since.

50E The Farm Credit Administration, which is the federal body responsible for regulating and examining the entities within the System, authorized the incorporation of PCA as a credit association in 1934. As an incorporated and federally chartered credit association, PCA is a statutorily declared federal instrumentality. See 12 U.S.C. § 2071(a), (b)(7), § 2077

(1994). PCA's corporate purpose, like that of all other credit associations, is to exercise the powers granted to it by Congress under the 1933 Act as it existed or as it has been amended. Among other things, PCA loans money for periods of ten years or less; does not lend to the general public, but lends only to qualified ranchers or farmers; is not a depository bank; and has no deposit insurance.

60E In 1971, Congress passed the Farm Credit Act of 1971 (1971 Act). See Pub.L. No. 92-181, § 2.17, 85 Stat. 583, 602 (1971). The 1971 Act made a number of significant changes to the 1933 Act, but retained the tax provisions contained within the 1933 Act. See id. The tax provisions in the 1971 Act provided in relevant part:

> Each production credit association and its obligations are instrumentalities of the United States.... Such associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, territorial, or local taxing authority.... The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the production credit association is held by the Governor of the Farm Credit Administration.

Id. (emphasis added).

70E In 1985, Congress passed the Farm Credit Amendments Act of 1985 (1985 Act). See Pub.L. No. 99-205, § 205, 99 Stat. 1678 (1985). The 1985 Act, among other things, repealed the highlighted sentences in the taxation section of the 1971 Act quoted above. See id., § 205(d)(16), 99 Stat. at 1705. As a

result, the limited waiver of immunity from state taxation that had been expressly worded in both the 1933 Act and the 1971 Act was not explicitly mentioned in the 1985 Act.

80E PCA timely filed New Mexico corporate income tax returns and timely paid New Mexico corporate income taxes for the tax years 1992, 1993, 1994, 1995, and 1996. PCA timely submitted claims for refund of all New Mexico income taxes paid for tax years 1992-1996 in the total amount of $343,782. PCA based its claims for refund upon its understanding that, as a federal instrumentality, it is immune from state taxation pursuant to the Supremacy Clause of the Constitution. After the Department denied its claims, PCA timely filed a protest. In this consolidated proceeding, PCA seeks all amounts claimed as refunds for its 1992-1996 tax years, plus interest thereon, as provided in NMSA 1978, § 7-1-68 (1996).

STANDARD OF REVIEW

90E The issue presented for our review is whether Congress intended to confer tax immunity upon privately owned production credit associations by passing the 1985 Act, which repealed the express tax immunity waiver contained in both the 1933 Act and the 1971 Act. The parties submitted this issue to the Department's internal hearing officer for consideration upon stipulated facts. Accordingly, we are presented with an issue of law, which we must review de novo. See State v. Ogden, 118 N.M. 234, 240, 880 P.2d 845, 851 (1994) (ruling that issues of law are reviewed de novo); State v. Romero, 119 N.M. 195, 197, 889 P.2d 230, 232 (Ct.App.1994) (ruling that interpretation of statute is an issue of law). In conducting our review, we will not defer to the hearing officer's decision "because it is the function of the courts to interpret the law." Morningstar Water Users Ass'n v. New Mexico Public Utility Comm'n, 120 N.M. 579, 583, 904 P.2d 28, 32 (1995).

DISCUSSION

I. FEDERAL INSTRUMENTALITY

100E PCA claims it is an instrumentality of the federal government. We agree. The 1933 Act expressly stated that credit associations like PCA are federal instrumentalities. See Pub.L. No. 73-75; § 63, 48 Stat. at 267. Although Congress significantly altered the 1933 Act when it passed the 1971 Act, Congress nevertheless maintained the classification of credit associations as instrumentalities of the federal government in the 1971 Act. See 12 U.S.C. § 2071(a) ("Each production credit association shall continue as a Federally chartered instrumentality of the United States."); 12 U.S.C. § 2077 ("Each production credit association and its obligations are instrumentalities of the United States...."). These provisions were not disturbed when Congress passed the 1985 Act, and they remain in effect to this day. In view of the fact that PCA is a federal instrumentality, we next address the consequences that result from PCA's status.

II. IMMUNITY FROM STATE TAXATION

A. Inherent Immunity

110E PCA claims credit associations, as federal instrumentalities, are inherently immune from state taxation under the Supremacy Clause of the United States Constitution unless Congress expressly waives that immunity. The Department counters that PCA's focus on constitutional immunity is misplaced because

> Congress did not rely on constitutional immunity in the original or subsequent Farm Credit Acts or enact a waiver of constitutional immunity. Rather Congress enacted both an explicit statutory immunity from state (and federal) taxes and an express statutory exception to that immunity for PCAs no longer federally owned.

In light of its contention, the Department intimates that credit associations like PCA would be subject to state taxation--even though Congress has deemed them to be federal instrumentalities--if not for Congress expressly granting them immunity from state taxation. We disagree with the Department. The Supremacy Clause inherently bars state taxation of federal instrumentalities, see McCulloch v. Maryland, 17 U.S. 316, 435-36 (1819), unless taxation is "authorized by Congress," see First Agric. Nat'l Bank v. State Tax Comm'n, 392 U.S. 339, 340 (1968).

120E As PCA claims, the now time-honored rule set forth in McCulloch has been followed by an unbroken line of Supreme Court decisions. See, e.g., United States v. Tax Comm'n, 421 U.S. 599, 605 (1975) (holding that state could not impose tax upon sales to military base); Department of Employment v. United States, 385 U .S. 355, 358-59 (1966) (holding that Red Cross as a federal instrumentality is immune from state taxation); Federal Land Bank v. Board of County Comm'rs, 368 U.S. 146, 149 (1961) (stating that "a federal instrumentality is not subject to the plenary power of the States to tax"); United States v. County of Allegheny, 322 U.S. 174, 176 (1944) ("[S]ince 1819, when Chief Justice Marshall in the McCulloch case expounded the principle that ... instrumentalities of the Federated Government are immune from taxation by [the States], this Court never has departed from that basic doctrine or wavered in its application."); Osborn v. Bank of the United States, 22 U.S. 738, 865 (1824) (ruling that congressional silence as to immunity from state taxation of federal

instrumentality did not change the fact that it was immune from state taxation); see also Peisker v. Unemployment Comp. Comm'n, 45 N.M. 307, 309, 115 P.2d 62, 63 (1941) (stating rule of McCulloch). In view of the fact that PCA is inherently immune from state taxation, we must next address whether Congress purposely waived its immunity and whether further legislation was intended to be a return to inherent immunity.

B. Congressional Waiver

130E The Department's internal hearing officer concluded, and PCA concedes, that Congress expressly waived the inherent tax immunity enjoyed by privately owned credit associations in both the 1933 Act and the 1971 Act. The hearing officer also concluded that Congress did not intend, by passing the 1985 Act, to confer upon these credit associations an implied immunity from state income and franchise taxes. In order to draw this conclusion, the hearing officer looked to the entire legislative history and congressional intent underlying the 1985 Act.

140E PCA contends the hearing officer erred by delving into legislative history and congressional intent because the 1985 Act expressly repealed the pre-existing waiver of tax immunity contained within the 1933 Act without qualification or equivocation. According to PCA, under the plain meaning rule, we must give effect to the 1985 Act's language and refrain from further interpretation because its language is clear and unambiguous. See State v. Jonathan M., 109 N.M. 789, 790, 791 P.2d 64, 65 (1990) (stating the plain meaning rule).

150E PCA correctly points out that neither an administrative agency nor an appellate court can resort to legislative history or the principles of statutory construction when the statute in question is clear and unambiguous. However, PCA is mistaken

in its contention that a statute that is apparently clear and unambiguous on its face is always subject to the plain meaning rule. As our Supreme Court has stated:

> [C]ourts must exercise caution in applying the plain meaning rule. Its beguiling simplicity may mask a host of reasons why a statute, apparently clear and unambiguous on its face, may for one reason or another give rise to legitimate ... differences of opinion concerning the statute's meaning. In such a case, it can rarely be said that the legislation is indeed free from all ambiguity and is crystal clear in its meaning. While ... one part of the statute may appear absolutely clear and certain to the point of mathematical precision, lurking in another part of the enactment, or even in the same section, or in the history and background of the legislation, or in an apparent conflict between the statutory wording and the overall legislative intent, there may be one or more provisions giving rise to genuine uncertainty as to what the legislature was trying to accomplish. In such a case, it is part of the essence of judicial responsibility to search for and effectuate the legislative intent--the purpose or object--underlying the statute. See Perea [v. Baca], 94 N.M. [624,] 627, 614 P.2d [541,] 544 [(1980)] (courts are permitted to interpret by looking to legislative intent if there is any doubt as to the meaning of the words) (emphasis added); State v. Herrera, 86 N.M. 224, 225-26, 522 P.2d 76, 77-78 (1974) (statute construed based on perceived legislative object and purpose, rather than on literal language)....

State ex rel. Helman v. Gallegos, 117 N.M. 346, 353, 871 P.2d 1352, 1359 (1994) (emphasis added).

160E As we explain below, both the history and background of the 1985 Act, and the apparent conflict between the 1985 Act's wording and the overall legislative intent expressly set out in the 1933 and 1971 acts, give rise to genuine uncertainty, as to what Congress was trying to accomplish when it passed the 1985 Act. Consequently, we must search for and effectuate the legislative intent underlying the 1985 Act.

1. 1933 Act and 1971 Act

170E We first consider the legislative acts that preceded the 1985 Act. In the 1933 Act, Congress expressly stated that it intended for credit associations to lose their immunity from state taxation when the federal government no longer owned stock in them. See Pub.L. No. 73-75, § 63, 48 Stat. at 267. In the 1971 Act, Congress continued to evince that intention. See Pub.L. No. 92-181, § 2.17, 85 Stat. at 602. In particular, Congress continued to expressly limit the tax immunity enjoyed by credit associations by stating

> [production credit] associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or any State, territorial, or local taxing authority.... The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the production credit association is held by the Governor of the Farm Credit Administration.

See id. (emphasis added). In view of the express language contained in both the 1933 Act and the 1971 Act, we hold that Congress intended to subject privately owned credit associations to state income and franchise taxes prior to passing the 1985 Act.

2. 1985 Act

180E In the 1985 Act, Congress repealed the two sentences in the taxation section of the 1971 Act that expressly exempted credit associations from state taxation until the federal government no longer held an ownership interest in them. See Pub.L. No. 99-205, § 205(d)(16), 99 Stat. at 1705. As a consequence, the express waiver that had appeared in both the 1933 Act and the 1971 Act no longer appeared in the 1985 Act. According to the Department, that result leaves us to consider (1) whether the deletion was intended simply to omit unnecessary language, having no substantive effect, since the waiver exception had completely swallowed the qualified exemption or (2) whether Congress intended a complete about-face on the issue of state taxation of credit associations. As we discuss below, we believe Congress simply intended to omit unnecessary language.

a) Surplus Language

190E As we stated above, Congress intended to subject privately owned credit associations to state income and franchise taxes under both the 1933 Act and the 1971 Act. Indeed, Congress hoped that the federal government's ownership interest in the credit associations would come to an end at some point and that the credit associations would eventually become locally owned by their borrowers. See S.Rep. No. 124, at 2, Congress's hope was realized in 1968, by which time every credit association was, in fact, privately

owned by the farmers and ranchers who had borrowed money from them. It would therefore have been useless, mere surplusage, for Congress to include an express waiver in the 1985 Act. By that time, every court that had had the occasion to address the taxability of privately owned credit associations honored Congress's intent and held in the tax collector's favor. See, e.g., Woodland Prod. Credit Ass'n v. Franchise Tax Bd., 37 Cal.Rptr. 231, 233 (Ct.App.1964) ("It is difficult ... to avoid the belief that, once these associations became farmer-owned, Congress meant to place them on a tax parity with comparable, privately held entities."); Montana Livestock Prod. Credit Ass'n v. State, 393 P.2d 50, 53 (Mont.1964); Columbus Prod. Credit Ass'n v. Bowers, 180 N.E.2d 1, 2 (Ohio 1962); Baker Prod. Credit Ass'n v. State Tax Comm'n, 421 P.2d 984, 985 (Or.1966) (en banc).

b) Technical Changes

200E In view of the fact that, by 1985, Congress had evinced its intention to subject privately owned credit associations to state taxation for well over 50 years and that the courts had uniformly supported Congress's power to do so, it would have been a major substantive change in legislative direction to suspend state taxation of such associations. As the Department argues, if Congress intended to make a major substantive change in the way credit associations were taxed by passing the 1985 Act, "one would expect that there would be some mention of the change in the legislative history." And yet there is none. To the contrary, the House Report commentary on Section 205 of the 1985 Act states:

> Section 205 contains numerous technical and conforming amendments to the provisions of the Farm Credit Act of 1971 affected by changes in the basic powers, duties and authorities of the

> Farm Credit Administration. This section would amend the appropriate provisions of the Act to delete the requirement for specific approval by the Farm Credit Administration of certain activities of the banks and associations and by deleting the general authority of the Farm Credit Administration to supervise System institutions. These changes are consistent with one of the major purposes of the legislation which is to establish the Farm Credit Administration as an arms length regulator of the System institutions and to take it out of certain activities of the System which would involve it in management discretion of such institutions.

H.R.Rep. No. 425, at 28 (1985).

210E Thus, neither the 1985 Act nor its written legislative history indicates any intention by Congress to purposefully remove the long-standing waiver of immunity from privately owned credit associations. We agree with the Department that "[i]t is extraordinarily unlikely that Congress would have intended such a marked change in the tax status of PCAs without a single mention of such change in any of the legislative history."

c) Return to Inherent Immunity

220E PCA's retort to this legislative history and congressional intent analysis is that "the Constitution provides immunity unless waived; and it is clear that the immunity was not waived for the period of PCA's claim for refund." PCA intimates that in light of McCulloch, Congress did not and could not legislate out of existence the credit associations' inherent immunity from state taxation under the Supremacy Clause without some

current express language doing so. We disagree.

230E In McCulloch, the Supreme Court determined that states lack the power to tax federal instrumentalities due to the Supremacy Clause. See McCulloch, 17 U.S. at 435-36. Thus, when Congress is completely silent on state taxation of a federal instrumentality, the Supremacy Clause would bar state taxation. See Osborn, 22 U.S. at 865. However, when Congress expresses its intention to subject a federal instrumentality to state taxation, it is obvious that the Supremacy Clause would permit taxation. See First Agric. Nat'l Bank, 392 U.S. at 340 (ruling that national banks, as federal instrumentalities, are only subject to state taxation to the extent authorized by Congress).

240E In the case at bar, Congress expressly waived the state tax immunity of privately owned credit associations since credit associations were first created by the 1933 Act. Although the language waiving the exemption from state taxation was dropped in the 1985 Act, our analysis of the 1985 Act's entire legislative history, both that in the Congressional Record and that shown by the historical background of the legislation, leads us to the conclusion that Congress did not intend to confer tax immunity upon privately owned credit associations in the 1985 Act. We therefore hold that PCA is not immune from the imposition of corporate income tax under the Supremacy Clause of the United States Constitution.

250E In crafting this holding, we acknowledge that the other courts that have considered the issue now before us for appellate review have ruled that, under the 1985 Act, all credit associations are immune from state taxation. See, e.g., Arkansas v. Farm Credit Servs., 994 S.W.2d 453 (Ark.1999); Farm Credit Servs. of Mid-America v. Department of State Revenue, 705 N.E.2d 1089 (Ind.TaxCt.1999). These courts, without exception, have based their decisions on the well-settled rule

that federal instrumentalities retain their inherent immunity from state taxation in the face of Congressional silence. See Arkansas, 994 S.W.2d at 455 ("Our federal government is immune from taxation imposed by the state, unless that immunity is waived, explicitly or expressly, by a statutory waiver of that immunity."); Farm Credit Servs. of Mid-America, 705 N.E.2d at 1092 ("The rule that the Supremacy Clause bars state taxation of federal instrumentalities, absent congressional waiver, dates from the U.S. Supreme Court's decision in McCulloch ....") (footnote omitted). Due to the fact that the 1985 Act fails to expressly waive the tax immunity enjoyed by credit associations, these courts have concluded that such associations are not subject to state taxation. See Arkansas, 994 S.W.2d at 456 ("The current version of § 2077, with its silence on the issue [of state taxation], compels a holding of immunity ...."); Farm Credit Servs. Of Mid-America, 705 N.E.2d at 1092 ("Because Congress has not waived ... immunity from state taxation, under the Supremacy Clause, Indiana is without power to collect the [tax] from Mid-America.").

260E In our view, these courts' narrow and exclusive focus on the 1985 Act's language produces a logical but incorrect result. We agree with the courts that if we looked at the law only at the time when PCA was taxed, PCA would be entitled to a refund for the 1992-1996 tax years because the 1985 Act is silent on the issue of state income taxation. Our review of the issue presented on appeal, however, is not confined to a cursory or wooden analysis of the 1985 Act. See Gallegos, 117 N.M. at 353, 871 P.2d at 1359 (ruling that it is our responsibility to search for and effectuate the legislative intent underlying the statute in question). After examining the 1985 Act's clear and extensive legislative history, we believe, for the reasons stated above, that Congress has unequivocally evinced its unwavering intention to subject privately owned credit associations to state

income taxation. In particular, we are most persuaded by the dissent in Farm Credit Services v. Arkansas, 76 F.3d 961, 967 (8th Cir.1996) (Loken, J., dissenting), rev'd on other grounds, 520 U.S. 821 (1997). We must give deference to that intention. See State v. Herrera, 86 N.M. 224, 225-26, 522 P.2d 76, 77-78 (1974) (ruling that when a legislative body's perceived legislative intent fails to coincide with a statute's wording, it is the perceived intent, and not the statute's literal language, that we must vindicate).

CONCLUSION

270E For the reasons stated, we affirm.

280E IT IS SO ORDERED.

BUSTAMANTE and SUTIN, JJ., concur.